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INFO RUCNSAD/SOUTHERN AF DEVELOPMENT COMMUNITY COLLECTIVE PRIORITY

RUEAIIA/CIA WASHDC PRIORITY

RHEFDIA/DIA WASHINGTON DC PRIORITY

RUEAWJA/DEPT OF JUSTICE WASHINGTON DC PRIORITY

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RHEHNSC/WHITE HOUSE NSC WASHINGTON DC PRIORITY

C O N F I D E N T I A L SECTION 01 OF 02 GABORONE 000583

SIPDIS

STATE FOR AF/S, AF/EX, L, DS
JUSTICE FOR JONATHAN WELCH

E.O. 12958: DECL: 07/24/2019

TAGS: PREL KLIG ABLD AMGT ASEC BC

SUBJECT: GOB WILL NOT INTERVENE IN IMPENDING SEIZURE OF
USG-OWNED HOUSE

REF: A. EMAILS BETWEEN POST AND HOLLIN DICKERSON AND
JONATHAN WELCH JULY 21-24 2009

IB. GABORONE 569

IC. GABORONE 554

Classified By: Ambassador Stephen J. Nolan for reasons 1.4 (b) and (d)

(C) SUMMARY. After prior assurances from the Ministry of Foreign Affairs (MFA) that the scheduled sale of a USG diplomatic residence was in violation of the Vienna Convention and would not proceed, Embassy Gaborone received late on July 23 a diplomatic note stating that the MFA did not have standing to intervene on behalf of the USG in a lawsuit brought by a former landlord and stating that the USG should urgently retain a lawyer to stop the proceedings. In response, Ambassador Nolan spoke to the Foreign Minister to raise the serious concerns of the USG and to further request MFA assistance. As a result of that conversation, on the morning of July 24 the Ambassador met with several high level officials, including the Foreign Minister and the Attorney General (AG) to continue to voice USG concerns. The position of the AG is that the Government of Botswana (GOB) has no standing to argue in court on behalf of the USG, but the GOB is willing to file an amicus curiae brief (a friend of the court brief) to lay out additional issues, including Vienna Convention considerations, for the High Court to consider. The AG sounded uncertain that the High Court would find that the Vienna Convention protects the USG residence currently scheduled for auction, and added that if the sale were to go forward the Ambassador would be likely found in contempt of court if he did not allow access to the premises. See action request in Paragraph 7. END SUMMARY.

I2. (C) In response to a Diplomatic Note received late on July 23, Ambassador Nolan called the Minister of Foreign Affairs and International Cooperation Phandu Skelemani to express his serious concerns about the way this matter is progressing. On July 16 the Ambassador met with the Foreign Minister to discuss the Karen Hendry lawsuit (see reftels) and received assurances that the scheduled sale of a USG diplomatic residence would not proceed. However, very late in the afternoon on July 23, the Embassy received a diplomatic note, which stated in relevant part, &Regarding the Writ of Execution against Immovable Property Lot 3069, the (USG) will have to engage a Private Attorney to approach the High Court and seek and order for recession of the judgment or appeal against the order. Given that the sale in execution is scheduled for 30th July 2009, it would be appropriate that an application be made on an urgent basis.⁸

The Ambassador told to the Foreign Minister that this is a serious negative step backwards and that the USG would view a seizure of any USG residence as a violation of the Vienna Convention. He said that USG owned property is inviolable,

just like the Chancery itself. He added that to continue to proceed in this case instead of starting afresh after proper service to the USG has been accomplished would not only add another layer of complications to this matter and would result in serious repercussions.

¶3. (C) In response to the Ambassador's concerns, the Foreign Minister reiterated that the GOB does not have standing to go to the court on behalf of the United States and that the High Court would not listen to any arguments that the GOB would make. Minister Skelemani said that if a Diplomatic Entity like the USG enters into a commercial contract that the court in Botswana is able to enforce that contract. However, he added that the GOB would not allow the organs of the government to execute against the USG property and that the Registrar had spoken to the Deputy Sheriff and instructed him not to execute. The Ambassador questioned how, if the MFA has no standing to enter into the court case now, will it later in the process have standing/ability to stop the execution of a court order? Minister Skelemani did not have a specific answer, but said that it would be &crazy8 to allow such a thing to happen. The Minister also suggested that a meeting would be required between the Ambassador, the Minister and the AG, Anhalia Molokomme and that he would try to schedule one for first thing on the morning of July 24.

¶4. (SBU) The Minister did set up a meeting on the morning of July 24. In attendance were the Ambassador, the Foreign Minister, the AG, the Deputy Counsel from the Attorney General's Office, Mr. Tshepo Motswagole, the Chief of Protocol from the Office of the President, Daphne Kadiwe, and the Permanent Secretary of the Ministry of Foreign Affairs,

GABORONE 00000583 002 OF 002

Samuel Outlule. The Ambassador thanked them for all meeting with him on such short notice and then reiterated all of his concerns that he had told Minister Skelemani on the previous evening. Additionally, the Ambassador said that the USG had retained local counsel overnight and asked the GOB to file amicus curiae brief on behalf of the USG to accompany the USG's filing to stop the sale. Further, he said that the USG has never tried to evade the court system in Botswana, but that as the USG is not the same as a commercial enterprise or individual, the USG needs to have precedent and protocol followed prior to joining a suit.

¶5. (C) Minister Skelmani was the first to respond and said that he was glad that the USG had retained a lawyer. He then asked for clarification on which of the USG properties was scheduled to be auctioned. After learning that it was not the CMR, he said &because if it was your residence, then it would definitely be protected by the Vienna Convention. The AG then concurred that the GOB has no standing in court and that this should not be viewed as an unwillingness of the GOB to uphold its obligations to other countries. She said her office would draft an amicus curiae brief &as long as time allowed,⁸ but that she couldn't be assured that the most senior people would draft it due to the time constraints. The AG added that during her time as a judge on the High Court that she saw many rulings set aside and sales of properties reversed even after the sale had taken place.

¶6. (C) However, she emphasized that all action must be properly taken and/or stopped through court channels. She said that in areas where international law and the laws of Botswana were in conflict that it would be up to the High Court to reach a reconciliation of the conflicting laws based on the facts. She was uncertain if the High Court would agree with the USG position that the USG residence was, in fact, covered by the Vienna Convention, and that she &hoped we could persuade the Court⁸ of the USG position. In response to this the Ambassador asked what would happen if the sale went forward and he did not allow access to the premises, as he has been instructed to do by Washington. The AG said that she would not advise that he prevent entry and that that would likely be seen as being in contempt of court.

The Ambassador reiterated that those were his instructions from Washington and that he would follow them, to which the AG said &those instructions could put you into some

difficulty.8

¶7. (C) ACTION REQUEST: Now that we have engaged local legal counsel and will be dealing directly with the court, it is possible that a stay will be granted and the auction cancelled or at least postponed while the case goes forward. Should that not happen, however, please advise how post should deal with any attempt to auction the property on June 30th. Our inclination, regardless of the AG's advice, is to prohibit any attempt by the Court's Agents to enter or seize USG property rather than accept what we view to be a violation of the Vienna Convention. End Action Request.

NOLAN